INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	9
Conclusion	15

CITATIONS

Cases:	
Blockburger v. *United States*, 284 U.S. 299	14
Gore v. *United States*, 357 U.S. 386	14
Hackworth v. *United States*, 380 F. 2d 19	12
Harrison v. *United States*, 387 F. 2d 614	12
Jones v. *United States*, 258 U.S. 40	10
Lisenba v. *United States*, 314 U.S. 219	10
Love v. *United States*, 386 F. 2d 260 certiorari denied, 390 U.S. 985	10
Mares v. *United States*, 383 F. 2d 805	14
Marshall v. *United States*, 360 U.S. 310	14
Nye and Nissen v. *United States*, 336 U.S. 613	10
Schaffer v. *United States*, 362 U.S. 511	13
United States v. *Vastine*, 363 F. 2d 853	12
Wood v. *United States*, 16 Pet. 360	10
Statutes and Rules:	
18 U.S.C. 1341	2
18 U.S.C. 1343	2
18 U.S.C. 2314	2
Proposed Rules of Evidence for the federal courts, Rule 4-03(a)	11-12

366-019—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 581

CHARLES HOFFMAN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1969. A petition for rehearing was denied on August 13, 1969. The petition for a writ of certiorari was filed on September 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence of petitioner's contemporaneous acts and transactions, in which petitioner improperly utilized the assets of the insurance association which he controlled for his own benefit, was

properly admitted into evidence to show his intent in the similar fraudulent conduct here charged, involving the same insurance association.

2. Whether, following a directed acquittal of petitioner's co-defendant, the court adequately instructed that the evidence admitted solely as to the co-defendant was not to be considered against petitioner.

3. Whether the trial court took sufficient cautionary measures to insure that the jury not read news items about the trial.

4. Whether the court properly imposed consecutive sentences for different acts and offenses committed on different dates.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of fraud by wire, in violation of 18 U.S.C. 1343 (count 1); mail fraud, in violation of 18 U.S.C. 1341 (count 2); and interstate transportation of funds obtained by fraud, in violation of 18 U.S.C. 2314 (count 4).[1] The court sentenced petitioner to imprisonment for ten years on count 4, and on counts 1 and 2—the wire and mail fraud counts—to probation for five years, to commence upon release from incarceration under count 4. A condition of probation

[1] At the close of all the evidence, the court directed acquittal of co-defendant Rufus McLarty on all charges and of petitioner on the charge of conspiracy (count 3) (App. 928).

"App." refers to appellant's appendix, "R." to the record, and "G.E." to government exhibits, in the courts below; "Pet. App." to the appendix to the petition for certiorari. All these documents are on file with the Clerk of this Court.

was to be that petitioner make restitution to the aggrieved parties (App. 2–9, 28–29). The court of appeals held that the condition of probation was indefinite in the form expressed and remanded for revision or vacation of the condition; otherwise the court affirmed the judgment (Pet. App. A. 19).

This case deals with a variety of complicated transactions involving the sale and manipulation by petitioner of certain insurance companies and their assets. The relevant evidence is set out in some detail in the opinion of the court below (See Pet. App. A. 1–7). In outline, it showed as follows:

Multi-State Inter-Insurance Exchange (Multi-State) was an insurance reciprocal operating in Illinois.[2] It sold only high risk automobile insurance to persons who had bad driving records (App. 534). Its sales agency was R.C.D. Insurance Agency (Agency). A different corporation, R.C.D. Management, Inc. (Management), was the attorney-in-fact for Multi-State and managed its affairs. Petitioner owned all the stock in Agency and Management.

Examination of the books of Multi-State by the Illinois Department of Insurance, commencing in the beginning of 1963, revealed that Multi-State did not have a surplus over its liabilities;[3] that its books

[2] Under Illinois law, an insurance reciprocal is an association of persons who aggregate their money to pay losses sustained by their members (App. 85). It is the property of the policy holders who are each responsible for a proportionate share of any of its losses (See Pet. App. A. 2).

[3] Under Illinois law, if the surplus falls below minimum requirements, notice must be given to the Insurance Department, which in such circumstances might order the company to refrain from writing new insurance (App. 91–92, 96).

failed to show a debt of approximately $200,000, based on 12% premium fees owed to Management, and that this debt if paid would have rendered Multi-State insolvent (App. 98, 127–133, 1025–1040; G.E. 1, 2, 4). Petitioner, the owner of Management, advised the Insurance Department that he did not intend to collect this debt and, in 1963 executed a waiver in writing of all commissions owed to Management from October 31, 1960, to December 31, 1962 (App. 134, 1040; G.E. 5).

As the examination continued, further difficulties in Multi-State's financial situation were revealed (See App. 136–143). After a variety of judicial proceedings to determine whether Multi-State could legally write new business (See App. 136–143, 144–146, 148–149, 151, 1041–1042, 1043–1045; G.E. 6, 7, 8), on December 18, 1963 a consent order was entered by a state court, pursuant to which Multi-State agreed to cease writing new policies, to dispose expeditiously of all claims against it, and not to resume the writing of policies without first notifying the Department and submitting to an examination (App. 152–153, 1045–1046; G.E. 9).

At the end of 1963, the books of Multi-State showed that it was insolvent to the extent of $783,000 (App. 378–379, 634–636, 1047–1049; G.E. 13). At that time, Agency owed it $607,000 and had no license to sell insurance (App. 387, 548, 635). Management had no value since its function was to act as attorney-in-fact for Multi-State, which was then insolvent.

2. In this state of affairs, petitioner on February 4, 1964, sold Management and Agency to co-defendant McLarty. The contract of sale, drawn by petitioner (App. 836), recited and made a part of the agreement that the principal assets of Agency consisted of its "many years of past and future good will" and its agency agreement with Multi-State; that the principal asssets of Management were its attorney-in-fact agreement with Multi-State and "its great earning power for the many years ahead"; and that the buyer had examined all the records of the three entities involved and was fully apprised of their financial condition (App. 1065–1069; G.E. 45).

By a complicated series of financial transactions, the amount paid by McLarty to petitioner came from a total of more than $585,000, which petitioner had withdrawn from bank accounts of Multi-State and ultimately had forwarded to a bank in a small town in Georgia (App. 204–206, 394, 620, 308, 216–217, 1063–1064, 325–339; G.E. 43–A, 44–A, 44B).[4] The final

[4] The process by which this was accomplished is significant. On January 2, 1964, petitioner directed the president of Management to draw a check payable from Multi-State funds to petitioner. On behalf of Management, the president inquired where it was going, that it was "an awful lot of money." Petitioner replied, "That's none of your business. Just sign it and I'll take care of it" (App. 195, 549, 1056; G.E. 31). The check was deposited in petitioner's personal account (App. 199). On the same day, a check for $30,000 transferred funds from Multi-State to Agency and petitioner drew a check on Agency to himself, for salary, in the amount of $20,000, which he deposited along with the $252,000 check, in his personal account (App. 192–196, 199, 406, 620, 1956; G.E. 31, 32). These sums were converted into cashier's checks of the same two amounts, pay-

agreement, executed on February 4, 1964, was accompanied by petitioner's affidavit that he was the president of Management. The purchase and sale agreement stated that he had not waived any rights to a contract he had with Management, by which petitioner was to receive the 12% commissions which he had previously waived (*supra,* p. 4). Petitioner told McLarty that under this agreement there had accrued an amount of $400,000 owed to him; and that he was agreeing to make the transfer for a lesser amount (over $300,000) for tax purposes (App. 233, 236, 239). Petitioner assigned the contract to McLarty with the approval of Management (App. 223–225, 1070–1073; G.E. 46).[5] The net result of the financial manipulations of Multi-State's $585,000, was that petitioner received from McLarty $333,000 from funds transferred from Multi-State to McLarty (App. 300, 304–306, 360–361, 1074; G.E. 49). It was admitted,

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able to petitioner (App. 200–201, 1061; G.E. 41–A). On January 28, 1964, petitioner closed out two accounts of Multi-State, causing to be drawn two cashier's checks for $123,000 and $99,000, respectively (App. 1061, 1075; G.E. 52–C, 52–D, 42–C). He also cashed a certificate of deposit of Multi-State, in the amount of $50,000, thereby forfeiting accrued interest of $2,000, stating in the endorsement, "All interest is waived, company needs funds for emergency for business needs" (App. 314–315, 348–349, 1061–1062; G.E. 42–A, 42–F). On January 29, petitioner withdrew $50,000 from another account of Multi-State, which was converted into a cashier's check (App. 1059; G.E. 37–E).

[5] Actually, this contract between Management and petitioner had already been terminated two days before (App. 1050; G.E. 14–A), and Multi-State was indebted neither to Agency nor to Management (App. 387).

both by petitioner and by McLarty's attorney at trial, and shown also by examination of the accounts, that McLarty paid nothing to acquire these two corporations and the resulting control of Multi-State (App. 449, 636, 840).

The charges upon which petitioner was convicted centered on various facets of this transaction with McLarty. Count 1 alleged that petitioner and McLarty devised and carried out a scheme to defraud the policy holders of Multi-State, and claimants against them, by fraudulently obtaining the money and property of Multi-State; that a part of this scheme was to pretend that $400,000 was due from Multi-State to Management; that petitioner caused approximately $585,000 to be transferred to a North Carolina bank, of which $333,000 was diverted to McLarty for the purpose of buying the stock of Management and Agency from petitioner and that on February 3, 1964, wire communication was used to transmit the credit of $585,000 to the North Carolina bank (App. 2–5). Count 2, incorporating the foregoing allegations except as to the wire communication alleged that on February 3, 1964, petitioner and McLarty caused a credit memorandum showing transfer of $585,000 to be sent by mail from Illinois to North Carolina (App. 5). Count 4 alleged that on February 5, 1964, petitioner caused $333,000 to be transported from North Carolina to Illinois, knowing that it was obtained by fraud (App. 9).

3. The government introduced additional evidence, independent of the transaction with McLarty, on the

issue of intent.[6] This evidence showed other fraudulent transfers of Multi-State assets, largely to other insurance companies owned by petitioner. These intricate transactions are detailed in the opinion of the court of appeals (Pet. App. A 4–7) and need not be repeated here.[7] In essence, they showed the stripping of Multi-State's assets through complex arrangements with other companies owned or controlled by petitioner.[8]

A lawyer formerly with the Department of Insurance testified to a conversation with petitioner in November 1961, in which he told petitioner that he should see that a more equitable position was maintained by Multi-State toward the claims submitted to it by policy holders. Petitioner replied "that if the State continued to push him on these things, he would write an excessive amount of premium and leave the

[6] Petitioner is mistaken in asserting that his request for discovery of documents relating to events occurring after February 4, 1964, the date of the sale to McLarty, was denied (Pet. 6). Judge Austin, on December 21, 1966, made a comprehensive order that all documents of Multi-State, Management, and Agency be made available to petitioner, on the most liberal terms and without restriction as to date (R. 104–109). Petitioner does not contend that the government failed to comply with this order.

[7] Petitioner was not surprised by this evidence, which had been the subject of extensive litigation in which he was represented by his principal counsel in the present trial. See App. 814, 841; R. 341, 347, 373, 414–415, 365). Counsel anticipated that these matters would be brought up in this trial (App. 34–42).

[8] For illustrations of these arrangements see, *e.g.*, (1) App. 543–545, 660–662; (2) App. 645–647, 649–652, 565–566, 654–659, 553, 531, 533, 536, 541, 543, 551, 552; (3) App. 477–479, 236, 480–481, 488–489.

State with an empty shell of a company" (App. 692, 696).

Petitioner in his testimony took the position that he acted in good faith and upon the advice of his attorney in representing that $400,000 was owed to Management and had not been waived. He testified (App. 775) that one of Illinois' insurance examiners "stated to me that * * * in order for me to obtain a complete favorable examination report on Multi-State, I would have to furnish him with this affidavit waiving the attorney-in-fact fees for 1961 and 1962. * * * I said in order to obtain a complete favorable examination report, I would comply with his request." His attorney had advised him, when he related these facts, that this was a conditional waiver to which he should give no consideration in calculating his fees. He testified that he believed his attorney and acted on his advice (App. 783–784, 797). The attorney corroborated this conversation (App. 866–867). Petitioner made no explanation why he considered it proper to transfer the funds of Multi-State in such a manner as to make them available for the purchase by McLarty of Management and Agency at no cost to the latter.

ARGUMENT

1. Petitioner's principal contention is that the trial court admitted a large volume of evidence which was unrelated to the specific offense charged. The court below properly rejected this claim. The offense here charged was that petitioner and McLarty devised and executed a scheme "to defraud the policy holders and

claimants against the policy holders of Multi-State and for obtaining the money and property of Multi-State by means of false and fraudulent pretenses" (App. 3). As "a part of the scheme" the details of the February 4, 1964, sale to McLarty and the representation that $400,000 was due Management from Multi-State were set forth. Petitioner sought at trial to exculpate himself as to the false representation concerning the $400,000 by the plea that he acted on the advice of counsel. It has long been settled law that:

> where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act, taken by itself, may not be decisive either way; but when taken in connection with others of the like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty. * * * [*Wood* v. *United States,* 16 Pet. 342, 360.]

The trial court, in short, has broad discretion in allowing testimony which discloses the purpose, knowledge or design of a particular person where intent is in issue. *Jones* v. *United States,* 258 U.S. 40, 48; *Lisenba* v. *United States,* 314 U.S. 219, 227; *Love* v. *United States,* 386 F. 2d 260, 266–267 (C.A. 8), certiorari denied, 390 U.S. 985; *Nye and Nissen* v. *United States,* 336 U.S. 613, 618.

In view of the fact that petitioner based his defense at trial on the argument that he did not have a fraudulent intent when he represented that Multi-State owed $400,000 to Management, the court quite correctly allowed the government to present evidence of other fraudulent transactions between petitioner and Multi-State in order to prove that petitioner had a fraudulent intent. As the court below recognized, the entire history of petitioner's transactions with Multi-State evidences a very conscious intention to drain Multi-State of its assets in a fraudulent manner, a fact which is crucially relevant to the government's answer to the defense raised by petitioner. Furthermore, the court adequately protected petitioner with its instruction that the jury should consider evidence of transactions not charged in the indictment only for purposes of determining intent and motive.[9]

Citing Rule 4–03(a) of the Proposed Rules of Evi-

[9] The instruction was in the following language (App. 1003):

"Now, you have heard evidence relating to certain transactions that are not charged in the indictment. That evidence has been offered for the limited purpose of determining whether or not the defendant had a motive to commit the crime charged, and were not introduced into evidence to prove a particular transaction with which he is charged. You are to consider that evidence only for the purpose of determining whether or not the defendant had a motive for committing those acts which are charged in the indictment.

"Evidence of those transactions which are not charged in the indictment shall not be considered by you until you find that the acts charged in the indictment have been done, and you are proceeding to determine the motive and the intent of the defendant."

dence for the federal courts (Pet. 23)[10] petitioner urges that the evidence of other transfers of assets of Multi-State outweighed in prejudice its relevancy to the issues. The comment to the proposed Rule defines "unfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Thus, for example, problems arise as to introducing evidence of a former conviction, remote in time, or of a different nature from the act charged, or where the prospect of introducing a former conviction may deter an accused from exercising his right to testify in his own behalf. Here no such problems were presented. The other transactions were substantially contemporaneous. They involved the same parties and the same question of intent. Their total effect was to refute petitioner's claim to good faith, because they showed an executed plan for the systematic plundering of Multi-State.[11]

2. Petitioner raises as an issue (Pet. 3, see also Pet. 15–16) but does not argue that the evidence introduced against McLarty was prejudicial to petitioner's

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[10] This reads:

"*Exclusion Mandatory.* Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

[11] The further contention that the admission of this evidence should have been accompanied by an instruction as to its purpose is without substance. Petitioner made no request for such a limiting instruction. Cf. *Harrison* v. *United States*, 387 F. 2d 614, 615 (C.A. 5); *Hackworth* v. *United States*, 380 F. 2d 19, 20 (C.A. 5); *United States* v. *Vastine*, 363 F. 2d 853, 855 (C.A. 3). In any event, such an instruction was in essence given by the trial court. See n. 9 *supra*, p. 11.

case. The court indicated early in the trial that a motion for judgment of acquittal by co-defendant McLarty might be well taken (App. 289–290). Thereafter the court exercised great care to advise the jury that all evidence which related solely to the conduct of McLarty was not to be considered in regard to petitioner (App. 309, 317, 319, 461, 467). Following the directed acquittal of McLarty, request was made on petitioner's behalf that the court strike from the record all references by government counsel in his opening statement, all testimony, all exhibits, and all parts of exhibits admitted which pertained solely to McLarty. The court asked counsel how this should be done. The reply was that the court should specify for the jury the names of witnesses whose testimony had been stricken. The court asked if it should go through the transcript and advise the jury, reading the testimony, that this was not to be considered against petitioner. Counsel stated that he did not know how it was feasible to do it at this stage. The court said that the way to do it was simply to tell the jury to disregard any evidence that was admitted solely as to the defendant McLarty (App. 931–932). In giving the promised instruction,[12] the court followed the only practicable course. There is no reason to believe that the jury failed to understand and follow the instruction. Cf. *Schaffer* v. *United States,* 362 U.S. 511.

[12] This was as follows (App. 1009): "During the course of this trial, certain evidence was admitted solely against the defendant Rufus McLarty, and I instruct you now as I have done throughout the trial not to consider that evidence against the defendant Hoffman. You are also to disregard all references

3. There has been, as petitioner urges, a tendency in some circuits to favor separate examination of jurors when there is a claim as to their possible contact with publicity unfavorable to the accused. Here the publicity in question seems less significant than the evidence which the jurors daily heard. (See Pet. 18–19). There is not here, as in *Mares* v. *United States,* 383 F. 2d 805 (C.A. 10), upon which petitioner particularly relies, any such "extreme situation" as a withdrawn guilty plea or an excluded confession. The headlines were innocuous. As the court below pointed out (Pet. App. A11–12), the trial court was meticulous in its daily admonitions and the possibility of prejudice would appear to be remote. As was said in *Marshall* v. *United States,* 360 U.S. 310, 312, each case must turn on its special facts. The situation here gives no substantial basis for concluding that the jury failed to follow the trial court's repeated warning that the jury avoid any outside reference to the case.

4. The court properly imposed consecutive sentences. The offense of transporting interstate money obtained by fraud involved wholly separate acts, even on a different day, from the offenses of wire fraud and mail fraud, as to which probation for a period of five years was imposed. The question involving consecutive punishment arising from a single transaction in *Blockburger* v. *United States,* 284 U.S. 299, and *Gore* v. *United States,* 357 U.S. 386, is thus not presented on this record (See opinion of court of appeals, Pet. App. A16).

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made by Mr. Schultz in his opening statement as to what he expected to prove against the defendant McLarty."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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